



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.32 OF 2008

DAVID KIPKEMOI KOROS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2039 of 2007 before the Kericho Resident Magistrate's Court (Hon. D. O. Rabala) dated 3rd August 2008)

JUDGMENT

1. The appellant was charged with the offence of defilement of a child between the ages of twelve and fifteen contrary to the provisions of section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence were that *“between the months of July and August 2007, on unknown dates and time at [particulars withheld] in Kericho Town within Rift Valley Province, (he) committed an act that caused penetration of his penis to a child, namely S M.”* The appellant also faced an alternative charge of *“indecent assault to a female contrary to section 144 of the Penal Code.”* He was tried and convicted, and was sentenced to a term of imprisonment of 30 years.

2. Dissatisfied with both the conviction and sentence, the appellant filed a petition of appeal in which he raised various grounds of appeal. Supplementary Grounds of Appeal dated 24th April 2015 were filed by his Counsel, Motanya & Co. Advocates, as follows:

1. The learned magistrate erred in law and in fact in that he erroneously admitted as evidence hearsay evidence. This prejudiced the appellant seriously and particularly as the learned magistrate relied on the same inadmissible evidence in his judgment thereby convicting the appellant on the inadmissible evidence.

2. The learned magistrate erred in law and in fact in that he incorporated into his judgment matters not canvassed before him at all.

3. That the judgment was bad in law and never considered the appellant's sworn evidence at all, it was biased and never analyzed evidence before the Court.

4. The learned magistrate erred in law and in fact in that he shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the actual age of the complainant.

5. That the trial magistrate erred both in law and in fact in believing the age of the complainant to be twelve (12) years when there was no birth certificate produced in court nor age assessment

to ascertain the complainant's actual age.

6. That the trial magistrate erred both in law and in fact in convicting the appellant based on a medical examination done two months after the alleged incident had occurred. The trial court did not rule out the possibility of any 3rd party being the person who may have committed the offence in question.

7. The evidence of the prosecution witness was so contradictory and full of discrepancies that it should not have been relied upon to convict the appellant.

8. The trial magistrate erred both in law and in fact in placing heavy reliance on the P3 form to convict the appellant yet the same does not indicate the age of the complainant's alleged injuries.

9. That the trial magistrate erred both in law and fact by failing to rebut the appellant's alibi.

10. The decision went against the weight of evidence before the Court.

11. The sentence awarded was bad in law as no reason was given for the same.

12. The learned magistrate erred in law in his treatment of the case as the circumstances surrounding the entire case did not point at the appellant as the offender at all. There were other hypothesis that were never considered.

13. The sentence awarded was harsh and excessive in all the circumstances of the appellant and of the case before the Court.

3. In his submissions on behalf of the appellant, Mr. Motanya argued, first, that the exact age of the victim was never established as there was neither a birth certificate nor age assessment done to establish the actual age of the victim. Further, that the victim was only examined two months after the alleged offence, which was too long and any other person could have been involved in the alleged offence. His submission was that there was nothing produced in court to connect the appellant to the offence. It was also his submission that the P3 form did not indicate the age of the injuries, and that the charge sheet was defective.

4. Mr. Motanya further submitted that the appellant had given an alibi defence. However, no mention was given of his defence in the judgment, nor were any reasons given for the judgment. His submission was that this was a proper case for the appeal to succeed, and for the conviction by the trial court to be quashed.

5. In her reply, Ms. Keli indicated that the State was conceding the appeal on the ground of the defective charge sheet. She submitted that the charge sheet was defective as the particulars are not specific and the age of the complainant has not been disclosed. It was also her submission that the alternative charge on the face of the charge sheet was based on a repealed law, section 144 of the Penal Code, which had been repealed by the 2nd Schedule of the Sexual Offences Act, No.3 of 2006. She further conceded that the age of the victim was not proved either by a birth certificate or an age assessment, yet such proof was crucial in guiding the trial court on the sentence to mete out on the appellant. She did not therefore submit on the other grounds of appeal.

6. Even though the State conceded the appeal, it is still the duty of this Court as the first appellate court, to re-examine and re-evaluate both the prosecution and defence evidence before the trial court and make independent findings and conclusions.

7. The State called 6 witnesses. PW1 was the complainant, who told the Court that she was 13 years old. She further testified that in July 2007, she was living around [particulars withheld] Hotel in Kericho and going to school at [particulars withheld] Academy. She stated that after school, a man who had been taking tea in a nearby kiosk appeared and gave her Kshs.1,000/- to buy milk and a loaf of bread. Then he

took her to a house attached to the hotel, tied her hands, stripped her and raped her. She escaped when he went to the toilet. That two days later, he called her, gave her Kshs.100 to buy a soda, pulled her into the house then raped her. She did not tell anyone until her teacher noticed that she was doing badly in school and beat her up, so she confessed. She further testified that she did not know the accused, but that she knew his face and he used to wear a cap.

8. PW2, S W A, stated that the complainant is the daughter of her sister in law, and they used to live in Kericho behind *[particulars withheld]* Hotel. She had been called by PW1's teachers in October 2007 and informed that the complainant had been sent home and had refused to go. She stated that PW1 then told her that she had been raped by the accused, and they went to *[particulars withheld]* hotel and PW1 identified the accused. Then they went to the police and the accused was arrested.

9. The evidence of PW3, S A, was that she was a teacher at *[particulars withheld]* Academy. Shaddia was her student in 2007. On October 4th 2007, she had noticed an exam paper for a student called K K was missing, and that PW1's paper was also missing. She then noticed that PW1 had taken K's paper and written her name. When confronted, PW1 stated that she had thrown her paper in the toilet. She then stated that someone was always waiting for her on the path home and touching her. She was taken by PW2 and PW3 to *[particulars withheld]* Inn hotel which is next to the school where she identified the appellant. PW3 further testified that PW1 took them to a room at *[particulars withheld]* Inn, and that other workers told them that the accused slept there.

10. PW4, was the investigating officer, Caroline Inyuma Mutiso. Her evidence was that she was in the office at Kericho Police Station on 4th October 2007 when the complainant came to the station accompanied by her guardian and teachers and alleged that she had been raped by the accused, whom they also brought along. She interrogated PW1 who stated that she had been raped several times before. PW4 then arrested the appellant.

11. The evidence of PW5 was that he examined the complainant, who was 12 years old, on 6th October 2007. She had been brought by police officers on the allegation that she had been defiled and sodomised between July and August 2007. He found that the hymen was broken and there was pus discharge from her private parts. She also had healed process of lacerations of the anus. He concluded that she had been defiled on different dates between July and August 2007.

12. At the close of the prosecution case, the trial court found that the accused had a case to answer, and placed him on his defence. He elected to give sworn testimony and to call witnesses. In his evidence, he stated that he comes from Bomet and does construction work. The complainant had come to the hotel and fabricated the case against him. He had welcomed them because he thought they had come to eat. He did not call any witnesses but closed his case on 11th September 2007.

13. In its judgment, the trial court set out the evidence that had been adduced before it. It found the evidence of the complainant candid, positive and credible. He noted that she had even taken PW2 and 3 to the room at Urwo Inn where the accused defiled her, and that other workers told them that the room is where the accused used to spend the night. The Court therefore concluded that the prosecution had proved its case beyond reasonable doubt, and convicted the accused as charged.

14. I note from the record that while the complainant stated that she was 13 years of age, PW6, who stated that he examined her, indicated that she was 12 years of age. There was, however, no proof of age produced.

15. Under the Sexual Offences Act, it is imperative that the age of the complainant be established, as such age guides the court in determining what penalty to mete out on the accused. It provides as follows:

Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence

termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4)

16. Further, the charge against the appellant is that he had committed the offence on a girl aged between thirteen and fifteen years of age on unknown dates in July and August 2007. The alleged offence was discovered in October 2007, two months later. While the medical evidence did indicate that the complainant was defiled and sodomised, there was nothing to connect the appellant with the offence. The Court found that the complainant had identified the room where the defilement took place, and that some workers had told PW2 and 3 that this is where the accused used to spend the night. However, these workers were not called to testify, and aside from the testimony of the complainant given two months after the alleged event, there is nothing to connect the appellant with the offence charged. All that can be said, from the evidence before the trial court, is that the complainant was defiled. When and by whom cannot be ascertained.

17. The State has conceded that the charge sheet was defective, and that the alternative charge was founded on a repealed provision of law. Taken in their totality, all these factors cast serious doubts on the prosecution case, a doubt that should have been resolved in favour of the appellant.

18. In the circumstances, I find that the conviction in this case was not safe, and it cannot be allowed to stand. The appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Delivered and Signed at Kericho this 5th day of December 2016.

MUMBI NGUGI

JUDGE